Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

Nos. 94-815 and 94-899

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioners,
v.
HAROLD LYNCH, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Eugene G. Bushmann
Kent L. Brown
CARSON & COIL, P.C.
P.O. Box 235
Jefferson City, MO 65102
(314) 636-2177

Roger G. Brown
Keith W. Brunstrom*
ROGER G. BROWN & ASSOCIATES
216 East McCarty Street
Jefferson City, MO 65101
(314) 634-8501

Craig S. Johnson
ANDERECK, EVANS, MILNE,
PEACE & BAUMHOER
P.O. Box 1280
Jefferson City, MO 65102
(314) 634-3422

Attorneys for Respondents
*Counsel of Record

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS FOLLOWED THE SUBSTANTIVE LAW IN DETERMINING THAT PSRS IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY?

II. WHETHER THE COURT OF APPEALS FOLLOWED THE SUBSTANTIVE LAW IN DETERMINING THAT MISSOURI'S ATTORNEY GENERAL IS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY IN AN ACTION SEEKING TO HAVE MISSOURI STATUTES DECLARED UNCONSTITUTIONAL?

PARTIES TO THIS PROCEEDING

Supplementing Petitioner Nixon's statement of Parties, Respondents state that they are all members of a class, certified on April 23, 1991 by the Honorable Scott O. Wright. Said class has been divided into two subclasses: (1) Subclass A consists of all persons who were employed by the State of Missouri prior to December 31, 1989; who have contributed to the Missouri Public School Retirement System; who have not been refunded their personal retirement contributions; and who have commenced receiving retirement benefits from the Missouri Public School Retirement System prior to January 1, 1990. (2) Subclass B consists of all persons employed by the State of Missouri prior to June 14, 1989; who have contributed to the Missouri Public School Retirement System; who have not been refunded their personal retirement contributions; and who have not commenced receiving retirement benefits from the Missouri Public School Retirement System prior to January 1, 1990.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as Lynch v. Public School Retirement System of Missouri, 27 F.3d 336 (8th Cir. 1994). Respondents incorporate by reference the statement of facts set forth in said opinion. As further statement of the case, Respondents are compelled to clarify and correct some serious inaccuracies in and omissions from the petitions.

Not every person who received a refund of their personal contributions from The Public School Retirement System of Missouri ("PSRS") under the challenged statutory scheme was required to transfer to the Missouri State Employees Retirement System ("MOSERS"). Petitioners have repeatedly misstated the facts in this regard to the courts at every level -- the simple truth is that some PSRS members were given the opportunity to receive a refund of all their accumulated contributions to PSRS on the condition that they transfer to MOSERS.[1] Many PSRS members transferred to MOSERS to get the refund, but others refused to accept this condition, and to accomodate their concerns, the legislature adopted legislation which allowed persons who were members of PSRS and currently employed by the State to **remain in PSRS and still receive a refund** of all their accumulated contributions to PSRS.[2] Respondents herein are persons similarly situated and seek only to be treated equally.[3]

Perhaps the most significant distortion by either of the Petitioners appears at page 3 of Nixon's petition. In discussing

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[1]1986 Mo. Laws 511 (House Bill 1496) and 1987 Mo. Laws 504 (House Bill 713).

[2]*See* §104.342.7(2) RSMo. (1992 Supp.). Incredibly, PSRS simply omits any reference to this important subsection of the statute, stopping just short of affirmatively misrepresenting that transfer to MOSERS was a prerequisite for everyone who received a refund of their personal contributions to PSRS. On the other hand, as discussed *infra*, Nixon was not similarly constrained.

[3]1989 Mo. Laws 500 (House Bill 610) -- *See* Appendix G (PSRS' Petition). This legislation also permitted former employees of Central Missouri State University who had retired under PSRS to elect to transfer to MOSERS and receive a refund of their accumulated contributions.

the effects of §104.342 RSMo.[4], Nixon states:

> This retirement election provision allowed then present employees of the State of Missouri to choose between two options. Firstly [sic] they could transfer from PSRS, a contributory retirement system, to the Missouri State Employees Retirement System (hereinafter "MOSERS"), a non-contributory retirement system with a refund of their PSRS contributions. Alternatively they could choose to remain in PSRS with no refund of retirement contributions.

Nixon's inventive analysis of the options afforded under §104.342 RSMo. is unquestionably repudiated by the plain language of §104.342.7(2) RSMo., which specifically allowed state employee members of PSRS to elect to remain members of PSRS on a noncontributing basis, and allowed them to receive a refund of all their accumulated contributions to PSRS.

Another inaccuracy appears at page 14 of Nixon's petition, wherein Nixon asserts that,

> any of the relief requested by plaintiffs against the Attorney General would in essence be a judgement against the State of Missouri, which in this case could result in a substantial money judgement and the dismantling of two retirement systems . . .

This assertion lacks any basis in law or fact. First, as discussed *infra* at Part IV, Nixon was added to this lawsuit pursuant to the legal fiction of *Ex parte* Young to allow the court to rule upon the validity of a Missouri statutory scheme and to provide remedial relief, if required, based upon its findings. PSRS -- not the State -- is the real party in interest. Second, assuming that

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[4]All statutory references are to Missouri Revised Statutes (1992 Supp.) unless otherwise noted.

MOSERS and PSRS are the two retirement systems which Nixon alleges to be in jeopardy -- MOSERS is neither a party to nor implicated in any manner by this lawsuit, and any money judgment against PSRS would not implicate the State fisc (*see infra* at Part III).

Petitioners' assertions of half-truths and omissions from the record bring into question the credibility of all statements made by Petitioners and constitute a disservice to this Court.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURT'S INTERVENTION.

The petition should be denied because it lacks any "special and important reasons" for granting it, as required by Supreme Court Rule 10.1. This case presents no new questions of law. It presents no substantial federal constitutional issue of novelty or requiring an interpretation. As will be discussed in Parts II and IV of this Argument, there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of this Court. As will be discussed in Parts III and IV of this Argument, there is no conflict between the judgment of the Eighth Circuit for which a review is sought and the decisions of other Courts of Appeals. Nor has the Eighth Circuit in its order "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1(a) of this Court.

II. THE EIGHTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THAT IT DID NOT SIMPLY DISMISS PETITIONERS' APPEAL, BUT FOUND THAT PETITIONERS WERE NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AND REMANDED FOR EVIDENTIARY FINDINGS BY THE DISTRICT COURT.

It is undisputed, as both Petitioners have recognized, that the Order of the Eighth Circuit denied Petitioners' respective claims of Eleventh Amendment immunity. *See* PSRS' petition, at 3 ("The Eighth Circuit rejected Petitioner's immunity claim"); and Nixon's petition, at 6 ("the Court of Appeals reversed the District Court's dismissal of plaintiffs' complaint as to the Attorney General . . . [and] rejected the District Court's Eleventh Amendment analysis"). In short, the Eighth Circuit rejected Petitioners' immunity claims.

Petitioners rely heavily on Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) ("PRASA"), for the proposition that they are entitled to an interlocutory appeal of a denial of their asserted immunity defense. Whether this Court's ruling in the PRASA case may properly be characterized as a "clarification" or an "extension" of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), Respondents assume *arguendo* that Petitioners are entitled to an immediate appeal of a district court order denying their immunity defenses.

Petitioners' broad reading of PRASA would apparently afford every defendant who sets forth a claim of immunity from suit a fundamental right to exhaust every level of appellate review on the issue of immunity before proceeding with the underlying litigation. Such an expansive interpretation is not

only unwarranted, but potentially inundating, and the cost to the courts and the parties of permitting such exhaustive piecemeal litigation clearly outweighs any benefit to be derived therefrom. Respondents assert that PRASA does not entitle Petitioners to have all issues of immunity determined by this Court before proceeding with the merits of litigation.

Unlike the appellate courts in Cohen and PRASA, the Eighth Circuit in the case at bar did not simply dismiss Respondents' appeal. Rather, in the present case, the Appellate Court made a determination that Petitioners are not entitled to Eleventh Amendment immunity, retained jurisdiction over the case, and remanded the case to the district court for an evidentiary hearing. Thus, Petitioners have already had a determination of their immunity claims by an appellate court in accordance with the Cohen and PRASA decisions. Petitioners, however dissatisfied they may be with the Eighth Circuit's ruling, are entitled to no further interlocutory litigation.

A discussion of the analysis and application of the various factors considered by the Eighth Circuit in determining whether an entity is entitled to Eleventh Amendment immunity might prove useful for potential future litigants, however, nothing in the PRASA opinion requires specific delineation or discussion of the analysis and reasoning behind its holding that Petitioners are not entitled to Eleventh Amendment immunity -- particularly in a case such as this, where the Court of Appeals has retained jurisdiction pending factual findings by the district court.

In its PRASA opinion, this Court was careful to point out that neither it nor the Court of Appeals had considered the merits of the Eleventh Amendment defense that was raised, and that neither expressed any view on the merits of the immunity claim.

PRASA, 113 S.Ct. at 686, n. 1 (1993).[5]

This Court's recent decision in Blatchford v. Native Village of Noatak, 501 U.S. 775, 115 L.Ed.2d 686 (1991), is legally and factually distinguishable from the case at bar. That case clearly involved a suit for money damages against the State. Two important and unique issues were presented in Blatchford: (1) whether Alaska's Eleventh Amendment immunity extended to claims brought by Indian tribes (as sovereigns), and (2) if so, whether this immunity had been abrogated by 28 U.S.C. §1362. This Court held that the Eleventh Amendment barred such federal court claims for damages against the State of Alaska, and that this bar was not voided by 28 U.S.C. §1362.

The case was remanded for determination of whether any viable claim under federal law for prospective injunctive relief was justified. 115 L.Ed.2d at 700.[6] Implicit in this Court's remand was that, if a viable claim for prospective injunctive relief was justified under federal law, the State official named was a proper party to the suit.

The case at bar does not involve a suit for money damages against the State. Respondents seek the return of funds they themselves paid to PSRS, an entity which is not the State and is not the alter ego of the State (as discussed *infra* at Part III). To

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[5]On remand, the First Circuit addressed the merits of PRASA's claim of Eleventh Amendment immunity and held the defense unavailable, noting that PRASA's inability to draw on the state treasury was crippling to its claimed defense. Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935 (1st Cir. 1993).

[6]On remand, the district court found the claims for prospective relief were moot due to the repeal of the original revenue-sharing statute that gave rise to the claim for damages, and dismissed the action. Native Village of Noatak v. Blatchford, ___ F.3d ___, 1994 WL 596953 (9th Cir. 1994).

the extent that PSRS relies on the challenged statutory scheme in its continued refusal to return Respondents' money, Respondents seek to have the challenged statutory scheme declared violative of the Equal Protection clause and/or the Due Process clause.

The Eighth Circuit's opinion in the case at bar is similar to this Court's decision in Blatchford in that both determined by implication that the State official named (here, Petitioner Nixon) was a proper party to the suit under *Ex parte* Young:

> We conclude that summary judgment in favor of PSRS and the Attorney General was not appropriate. The district court gave two reasons for its decision, neither of which withstands scrutiny. The first was that even if the challenged statutory provisions were found to violate the Equal Protection Clause, PSRS lacked authority to refund the plaintiffs' personal retirement contributions. The court reasoned that only the legislature could require such refunds. The plaintiffs, however, not only sought refunds but alternatively requested any other relief that might be appropriate, under the latter alternative, the district court at least could require PSRS to recover the refunds already made pursuant to an unconstitutional scheme.
>
> The district court's second reason was that the Eleventh Amendment bars relief because plaintiffs seek retroactive rather than prospective relief. *See Green v. Mansour*, 474 U.S. 64 (1985). We disagree. If the statutory scheme is in fact unconstitutional, the continued implementation of such a scheme constitutes an ongoing violation of federal law, regardless of whether some or all persons similarly situation to plaintiffs have already received their refunds.
>
> At this time we need not determine the outer limits of the district court's authority to order particular

> remedies, such as refunds to the plaintiffs. It is sufficient for now to say that the district court clearly has the authority to find the statutory scheme unconstitutional and to order an appropriate remedy.

Lynch v. Public School Retirement System of Missouri, 27 F.3d 336, at 338-339 (footnote omitted).

The Eighth Circuit properly rejected Petitioners' claimed Eleventh Amendment immunity defense in this case for two very sound and simple reasons -- (1) the relief sought in this case does not implicate the State fisc, and (2) the State of Missouri is not the real party in interest in this case.

III. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT THIS ACTION AGAINST THE PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI IS NOT BARRED BY THE ELEVENTH AMENDMENT, WHETHER OR NOT ITS OPINION CAREFULLY AND ACCURATELY ARTICULATED THE FACTORS INVOLVED IN ITS ANALYSIS OF ELEVENTH AMENDMENT IMMUNITY.

Each of the Questions Presented by Petitioner PSRS begs the initial inquiry that must be made -- whether PSRS is an entity which is entitled to Eleventh Amendment immunity. When (as here) the issue before the court is whether the Eleventh Amendment applies to the entity claiming its protection, Edelman v. Jordan, 415 U.S. 651 (1974), Green v. Mansour, 474 U.S. 64 (1985), Papasan v. Allain, 478 U.S. 265 (1986), and other similar cases have no application whatsoever.

> Those cases address the forms of relief available when it is clear that relief will run against a state; they do not address the preliminary issue of when relief is deemed to run against the state. As to the former issue, whether the primary relief sought is monetary and/or retroactive

is conclusive; as to the latter, it is not.
Kovats v. Rutgers, the State University, 822 F.2d 1303, 1310 n. 7 (3rd Cir. 1987).

In Edelman, as in Green and Papasan, there was no dispute that the Eleventh Amendment applied to the entity claiming its protection -- clearly it did -- the issue in those cases was whether the suit could be maintained pursuant to the exception created by *Ex Parte* Young, 209 U.S. 123 (1908).

This Court's prior decisions are controlling, and the rule to be derived therefrom is that the Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts and to directly implicate the State treasury.

In Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977), this Court held that the Eleventh Amendment did not extend to counties and similar municipal entities. *Id.* at 280. It is the nature, functioning, and source of funding of the entity, rather than the fact that it was created by state law, which decides whether it may claim the protection of the Eleventh Amendment.

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), this Court declined to extend Eleventh Amendment protection to an entity which was created by state law, governed by state appointed officials, actually an agency of the state, and exercised state power in performing what was essentially a traditional state function. *Id.* at 399-402. One particular passage from Lake Country bears repeating here:

> By its terms, the protection afforded by the Eleventh Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same

> practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

Id. at 400-401 (footnotes omitted). There is no justification for reading additional meaning into the limited language of the Eleventh Amendment.

Earlier this term, this Court decided Hess v. Port Authority Trans-Hudson Corp., No. 93-1197, 1994 WL 630234 (U.S.), which addressed the Eleventh Amendment immunity issue, and held that the Port Authority was not entitled to such immunity.[7] In Hess, this Court acknowledged that the impetus for the Eleventh Amendment was the prevention of federal court judgments that must be paid out of a State's treasury. Harmonizing the opinions of the Second and Third Circuits which were asserted to be in conflict, this Court held that the "state treasury" criterion -- whether any judgment must be satisfied out of the state treasury -- is the most important consideration in resolving an Eleventh Amendment immunity issue.[8]

The instant situation is a bit more akin to Hess than to Lake Country, in that not all of the indicators of immunity or the absence thereof point the same way. Still, if this Court were to

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[7]Petitioner PSRS apparently believed that this Court's decision in Hess would be favorable to its position, as PSRS made numerous references to Hess in its Petition, and extensively relied on its anticipated outcome.

[8]Citing cases from the 1st, 2nd, 3rd, 5th, 6th, 7th, and 8th Circuits, the Hess opinion recognized that the vast majority of Circuits have identified the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations, and, in practice, have generally accorded the "state treasury" factor dispositive weight.

remand for reconsideration in light of its decision in Hess, as urged by Petitioner PSRS, there is no reason to believe the result would be any different, for several reasons.

A. Source of Funds. The funds held in PSRS accounts are not State funds, but are derived wholly from contributions by members and members' employers (and earnings).

First and foremost, Missouri's state treasury is not implicated by, and indeed is insulated from, any judgment that may be had in this case.

At the inception of PSRS, local retirement systems were discontinued and the local school boards who had previously administered such retirement systems paid over the local money to PSRS. PSRS assumed the responsibility of providing retirement benefits to the teachers who had formerly been members of local systems. *See* §169.021(3) and (4) RSMo.

PSRS was conceived as a financially independent entity. It receives the bulk of its funds from member contributions and matching contributions from members' employers, *i.e.*, practically all of PSRS' funds come from local school districts and the teachers employed by those districts. §169.030 RSMo. Investment income accounts for PSRS' secure financial position. The vast majority of employee/members are local school teachers employed by local school districts which are clearly not a part of the State for Eleventh Amendment purposes. *See* Mount Healthy v. Doyle, 429 U.S. at 274.

The State does not appropriate funds to PSRS. On behalf of the small number of state-employed teachers that are PSRS members, the State of Missouri does contribute some funds to PSRS, pursuant to its statutory obligation as an employer to contribute matching funds. Upon their payment to PSRS, such

funds cease to be State funds. *See* §169.040 RSMo.; *accord* Kovats v. Rutgers, the State University, 822 F.2d 1303, 1308 (3rd Cir. 1987).

One of the principal defects in Petitioners' briefs on their claims of Eleventh Amendment immunity is the repeated equation of the term "public funds" with the term "state funds". They are not synonymous. PSRS holds legal title to all funds arising from the operation of the system. By statute, said funds are not "state funds" and are not even to be commingled with state funds.

> All funds arising from the operation of §§169.010 to 169.140 shall belong to the retirement system herein created and shall be controlled by the Board of Trustees of that system which board shall provide for the collection of said funds, shall see that they are safely preserved, and shall permit their disbursement only for the purposes herein authorized. The said funds and all other funds received by the retirement system are declared and shall be deemed to be the monies and funds of the retirement system and not revenue collected or monies received by the state and **shall not be commingled with state funds**.

§169.040.1 RSMo. (emphasis supplied).

This subsection draws a clear distinction between PSRS funds and State funds, vesting PSRS with title to all funds held by PSRS and depriving the State of Missouri of any right or title to said funds. The distinction is reiterated in subsection 3 where the statute provides, "all investments shall be made for the account of the retirement system, and any securities or other properties obtained by the Board of Trustees may be held in the name of the retirement system". §169.040.3 RSMo.

The distinction continues in subsection 4, which provides that PSRS funds may be deposited in a bank, but only in the name of the retirement system and checks may be made payable thereon

only in the name of the system. §169.040.4 RSMo. Suits to collect money due from members and employers must be prosecuted by the Board of Trustees in the name of the retirement system, and not by the State of Missouri. §169.030.2 RSMo. Significantly, the Treasurer of the State of Missouri has no power to collect, disburse or control PSRS funds.

The General Assembly provided start-up funds for PSRS, but required such funds to be repaid in full to the State Treasury within two years after start-up. §169.110 RSMo. (1986).

Petitioners attribute significance to the fact that PSRS is audited by the State Auditor, pursuant to §169.020.22 RSMo. While it is true that the State Auditor may only audit "public funds", she is not limited to auditing "state funds" -- she also audits cities and counties, entities which are clearly not entitled to Eleventh Amendment immunity. §29.230 RSMo.

PSRS funds are not "state funds" and are not part of the State treasury. A judgment against PSRS, it is thus apparent, would not be enforceable against the State of Missouri. Debts and other obligations of PSRS are not liabilities of the State.

B. Proprietary Functions. PSRS performs a proprietary function of investing funds and administering a retirement program.

As a starting point, Webster's New Collegiate Dictionary provides us with definitions for several terms which are of considerable importance in distinguishing between governmental and proprietary functions:

"government" is "the political function of policy making as distinguished from the administration of policy decisions"

"proprietor" is "one having an interest (as control or present

use) less than absolute and exclusive right"

"trustee" is "a natural or legal person to whom property is legally committed to be administered for the benefit of a beneficiary"

In light of these definitions, it is clear that the very nature of a trustee's job is proprietary. The function of the PSRS Board of Trustees is similarly proprietary. So-called "governmental functions" are those which are normally undertaken by a public entity for the good of the general public. PSRS is responsible for providing retirement allowances and other benefits for public school teachers, which is a distinctly narrower classification of beneficiaries than the general public. Aiding this determination is the fact that the vast majority of PSRS members are teachers employed by local school districts.

The creation, maintenance and administration of a retirement system for a specific group of employees is a function that is customarily performed by private businesses, such as insurance companies. Thus, in the case at bar, the function performed by PSRS and its trustees/administrators, in creating, maintaining, and administering a retirement system for a select group of persons is more proprietary in nature than governmental.

C. State Control. The State does not possess sufficient control over PSRS such that PSRS could properly be called an extension of the State itself.

It is fundamental that the ultimate control with every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity. *See* Mount Healthy City

School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977). Indeed, "[v]irtually every enterprise, municipal or private, flourishes in some sense at the behest of the State. But [this Court has] never found the Eleventh Amendment's protections to hinge on this sort of abstraction." Hess, slip op. at ___ (dissenting opinion of Justice O'Connor). PSRS is not entitled to Eleventh Amendment immunity.

PSRS was created by §169.020.1 RSMo. and declared to be "a body corporate . . . under the management of a board of trustees". By comparison, the Missouri State Employees Retirement System ("MOSERS") was created by §104.320 RSMo. and declared to be "a body corporate **and an instrumentality of the state.**" Likewise, the Highways and Transportation Employees' and Highway Patrol Retirement System ("HTEHPRS") was created by §104.020 RSMo. (1986) and declared to be "a body corporate **and an instrumentality of the state.**" (emphasis supplied).[9]

PSRS is a corporation separate from the State of Missouri which is empowered to sue and be sued in its own name, transact all of its own business in its own name, invest all of its funds in its own name, and hold all of its cash, securities, and other property in its own name. §169.020.1 RSMo.

Responsibility for the general administration of PSRS is vested in the seven-member Board of Trustees. §169.020.2

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[9]Comparing these examples makes clear that the Missouri General Assembly knows how to create an instrumentality of the state and knows what language is necessary to do so. Despite numerous opportunities to do so through the many amendments to legislation dealing with PSRS, the legislature has simply chosen not to structure PSRS as an instrumentality of the state. PSRS can thus be readily distinguished from MOSERS and HTEHPRS, both of which are instrumentalities of the state, by the legislatively declared difference in management and state involvement.

RSMo. Significantly, a majority of the trustees are elected by the membership rather than appointed by the State, thereby depriving the State of control of the Board. Four of the trustees are elected by the members and retired members of PSRS. The State Commissioner of Education serves as a trustee by virtue of his office. Two other trustees are appointed by the State Board of Education.

IV. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT THIS ACTION AGAINST THE ATTORNEY GENERAL OF MISSOURI IS NOT BARRED BY THE ELEVENTH AMENDMENT, WHETHER OR NOT ITS OPINION CAREFULLY AND ACCURATELY ARTICULATED THE FACTORS INVOLVED IN ITS ANALYSIS OF ELEVENTH AMENDMENT IMMUNITY.

The State of Missouri is not the real party in interest in this case merely because its Attorney General is named as a defendant. At the insistence of the District Court, Respondents added Attorney General Nixon as a party defendant in this action. The District Court may have believed the Attorney General to be a necessary party in this action because Respondents seek to have a statute (or the application thereof) declared unconstitutional. Although Missouri law is not a model of clarity on this issue, it is clear that §527.110 RSMo. (1986) requires that the Attorney General be given notice of and an opportunity to participate in any action involving the constitutionality of a Missouri statute.

Moreover, it has long been held that §1983 is a viable vehicle for vindication of federally protected rights as against acts of state government through state officials. *See* Ex parte Young, 209 U.S. 123 (1908). Although this has been tailored to some degree by the Eleventh Amendment, a federal court may properly have before it the persons who are charged with enforcing and

carrying out a statute that is constitutionally infirm, and may issue an injunction or other court order granting prospective relief to ensure that future conduct is in accordance with federal rights. It is elementary that a state cannot require conduct that violates the federal constitution.

The Attorney General of the State of Missouri (Petitioner Nixon), like the Attorney General of the State of Minnesota in *Ex parte* Young, 209 U.S. 123, 28 S.Ct. 441, at 454 (1908), has general authority to enforce the laws of the State. It is not necessary that the state official named as the nominal party representing the State have a specific duty to presently enforce the statute challenged. *Id.* at 453. Under the doctrine laid down in *Ex parte* Young and followed to the present day, the Eleventh Amendment does not bar suit against the Attorney General for a declaration that a statute is unconstitutional.

The application of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), cited by Petitioner Nixon, is far narrower than Nixon appreciates, as the following passage illustrates:

> When the suit is brought only **against state officials**, a question arises as to whether that suit is a suit against the State itself. . . . The Eleventh Amendment bars a suit against state officials **when "the state is the real, substantial party in interest."**

Id. at 101 (emphasis supplied; citations omitted). Here the suit is not brought only against state officials. As discussed above, PSRS is not an instrumentality of the State, and the State is not the real, substantial party in interest merely because the Attorney General has been named as a nominal party in an action seeking, among other things, a declaratory judgment on the constitutionality of a statute.

And, as noted by the Court in Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989):

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State."

Will, 109 S.Ct. at 2311-12, n. 10, *citing* Kentucky v. Graham, 473 U.S. 159, 167, n. 14 (1985); and *Ex parte* Young, 209 U.S. 123, 159-60 (1908).

Petitioner Nixon further alleges that he has no authority for enforcing the challenged statutes or effectuating the relief requested by Plaintiffs. As Attorney General, however, Nixon is the statutory attorney for both MOSERS[10] and PSRS[11].

Petitioner Nixon next contends that the statutory scheme at issue has been fully enforced. This contention begs the ultimate issue -- if those portions of the statutory scheme denying Respondents' refund are found to violate the Equal Protection clause and/or the Due Process clause, the Attorney General would be under a continuing duty to enforce the laws of the State of Missouri in a manner consistent with the Equal Protection clause and the Due Process clause. Thus, only after a final determination of the obligations imposed upon Petitioners by the statute has been made in the form of a declaratory judgment will there be a sufficient basis to say whether the Attorney General's obligation has been fully performed.

Green v. Mansour, 474 U.S. 64 (1985), cited by both Petitioners, is distinguishable on its facts from the case at bar. In Green it was conceded that "any claim they might have had

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[10]§104.520 RSMo. (1992 Supp.) provides: "The attorney general of the state shall furnish, upon request, whatever legal services are necessary."

[11]§169.020.20 RSMo. (1992 Supp.), provides: "The attorney general shall be the legal advisor of the board of trustees, and shall represent the board in all legal proceedings."

for the specific type of injunctive relief approved in *Ex parte* Young was rendered moot by the amendments to the AFDC program." The issue here, on the other hand, is not moot. The policy of the PSRS has not changed -- PSRS refuses to refund to the Respondent class members their own personal contributions, money which they paid to PSRS while they were state employees. This policy continues to violate the Equal Protection and Due Process rights of Respondent class members. Declaratory and injunctive relief are available to prevent the PSRS' continued denial of equal protection regarding such refunds. As the Court in Green itself recognized, "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68.

CONCLUSION

For the reasons set forth above, Respondents state that the decision of the Eighth Circuit Court of Appeals does not create, or resolve, any conflict with the decisions of this Court or the decisions of other Circuits, and that Petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

Keith W. Brunstrom (Mo. Bar #38343)
Counsel of Record
Roger G. Brown (Mo. Bar #29055)
ROGER G. BROWN & ASSOCIATES
216 East McCarty Street
Jefferson City, Missouri 65101
Telephone: 314/634-8501

Eugene G. Bushmann (Mo. Bar #17111)
Kent L. Brown (Mo. Bar #38992)
CARSON & COIL, P.C.
P.O. Box 235
Jefferson City, Missouri 65102
Telephone: 314/636-2177

Craig S. Johnson (Mo. Bar #28179)
ANDERECK, EVANS, MILNE,
PEACE & BAUMHOER
P.O. Box 1280
Jefferson City, Missouri 65102
Telephone: 314/634-3422

Attorneys for Respondents

December 5, 1994